house where she now lives, after the decease of her mother, or the day of her marriage. Also, I give, devise, and bequeath unto my daughter Rachel James the house now in the occupation of David Davies, after the decease of her mother, or the day of her inter-marriage." The two houses mentioned in the second clause were the same as the two first spoken of. The testator never had more than the children named above. It was held that, upon the construction of the will, the daughters upon the death of the mother became tenants for life of each house, with immediate remainder to themselves as tenants in common in tail. Parke B. said at page 1564:—

"Now, adopting the rule .... that *we are to make all the parts of the will reconcilable if possible*, I think we may in this case make the whole consistent; *viz.*, by giving an estate for life in severalty to each of the daughters in one house, with remainder in both of them to the two, as tenants in common in tail. *Effect is thus given to every word in the will ....*"

The second example is *Re Alexander's Will Trust*(2) already mentioned by my Lord President.

Returning now to the instant will, I think that it is clear that the testator had intended to leave something (1/10th share of the lands) to the cousin, as otherwise clause 6 would not have been written at all. It is equally clear that the testator had also intended to leave only the *residue* of the same lands to his widow and children: he could not have intended to leave the whole of these lands to them, because he had already bequeathed part to his cousin. Such a construction of this will to render every part of it operative is a reasonable one, it makes all the parts of the will reconcilable and gives effect to every word in it.

Ali F.J. concurred.

*Appeal allowed.*

Solicitors: *Chooi & Co.; Cheah, Chew & Tan.*

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## SRI JAYA TRANSPORT CO. LTD. v. FERNANDEZ

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) September 19, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 69 of 1969]

*Practice and Procedure — Appeal from order made by judge in chambers on application heard in open court — Application for leave to appeal — R.S.C. 1957, O. 54 rr. 22 & 22A — Courts of Judicature Act, 1964, s. 68(2).*

In this case the respondent had applied by summons in chambers to amend his statement of claim. The application was heard in open court and granted. The appellants thereupon applied for a certificate under Order 54 r. 22A that the judge required no further argument. When the appellants got the certificate, they thought they were out of time and therefore application was made for special leave to appeal out of time under rule 13 of the Federal Court (Civil Appeals) (Transitional) Rules, 1963.

**Held:** the appellants in this case should have applied for leave under section 68(2) of the Courts of Judicature Act, 1964 and as they had failed to do so and have not shown that there are special grounds for the court to exercise its discretion to grant them special leave to appeal out of time, the application must be dismissed.

*Cases referred to:—*

(1) *Abdul Majeed* v. *Yeo Chng Tay* [1964] M.L.J. 75.

(2) *Ramanath & Ors.* v. *Ban Tsan Chuan* [1967] 2 M.L.J. 284.

(3) *John Puddicombe Wilkins & Ors.* v. *John Patrick Kenelm Wilkins & Anor.* [1951] M.L.J. 80.

(4) *D.C. Butler-Madden v. Krishnasamy* [1947] M.U.L.R. 163; [1947] M.L.J. 182.

(5) *Re Coles and Ravenshear* [1907] 1 K.B. 1.

(6) *Hendry v. de Cruz* [1949] M.L.J. Supp. 25.

(7) *Manickam* v. *Tremelbye Rubber Co.* [1949] M.L.J. 90.

(8) *Re Macadam (No. 2)* [1950] 1 All E. R. 659.

(9) *Nagappa Rengasamy Pillai* v. *Lim Lee Chong* [1968] 2 M.L.J. 91.

FEDERAL COURT

*P. Mooney* for the appellants/applicants.

*Ranjit Singh* for the respondent.

*Cur. Adv. Vult.*

Suffian F.J.: I have had the advantage of reading my brother Ali's judgment and I agree that this application (not for leave to appeal, but for leave to file notice of appeal out of time) be dismissed.

The order sought to be appealed from is an interlocutory order. As it happened, it was made not in chambers, but in open court under Order 54, rule 22, and it has been held by this court in *Nagappa Rengasamy Pillai v. Lim Lee Chong*(9) that, notwithstanding the proviso to Order 54, rule 22, in these circumstances the first limb of sub-section (2) of section 68 of the Courts of Judicature Act, 1964, does not apply, so that no appeal lies unless leave is obtained from this court or from a judge of the High Court. In other words, there is no need for the aggrieved party to apply, as has been done here, within four days of the making of the interlocutory order for a certificate from the judge that he requires no further argument.

If there is any conflict between section 68(2) of the Act and the Rules of the Supreme Court on this point, then it is clear from section 4 of the Act that the Rules, being written law in force at the commencement of the Act, shall give way to the section.

In the circumstances, I would dismiss this application with costs.

Ali F.J.: This is an application for special leave to appeal out of time under rule 13 of the Federal Court (Civil Appeals) (Transitional) Rules, 1963 — L. N. 242/63.

In Civil Suit No. 502 of 1966 the applicants, a road transport company, was sued by its ex-employee, the respondent, for wrongful dismissal. The action, commenced in 1966 and now pending in the High Court, has been postponed for hearing from time to time since 1968. Two days before the last date fixed for hearing, i.e. 9th May, 1969, the respondent/plaintiff applied by summons in chambers to amend his statement of claim. It was heard in open court and the reason for this, according to the applicants' affidavit was that "since counsel were robed for the trial, the learned judge stated that he would prefer to deal with it in court and adjourned immediately into open court". But from the case file the learned judge in a judgment, apparently prepared for appeal, said that he adjourned the matter to open court because "Mr. Mooney objected to the delay by the plaintiff in making the application and submitted that he had quite a long argument on the matter". Whatever may be the true reason, the matter appeared to have been directed to be heard in open court by the learned judge under rule 22 of Order 54 of the Rules of the Supreme Court, which is this:—

"22. The judge in chambers if he thinks it desirable that any summons, appeal or application owing to its importance or the length of the time likely to be occupied or for any other reason should be heard in court may direct that the same be so heard or may adjourn the same to be so heard. Provided that any decision in court on any such summons, appeal or application shall be deemed to be a decision at chambers."

That the applicants are of the view that this rule has been applied is plain from their letter dated 9th May, 1969 to the court which is in these terms:—

"The Senior Assistant Registrar,
High Court, *Kuala Lumpur.*

Dear Sir,

K. L. High Court Civil Suit No. 502/66
*M.L. Fernandez* v. *Sri Jaya Transport Co. (P.T.M) Ltd.*

In connection with the summons in chambers for leave to amend, we are instructed to request a certificate, under Order 54 rule 22A, that his Lordship requires no further argument. The matter was adjourned into court for argument this morning but, *under the proviso* to rule 22, is deemed to be a decision at chambers and a certificate is therefore required by section 68(2) of the Courts of Judicature Act 1964 before the defendant can appeal against the order which was made.

Yours faithfully,
Sd. Skrine & Co."

For myself, I have no doubt that rule 22 has been applied in this case by the learned judge so that it was no longer necessary for the applicants to resort to rule 22A. That they did so in this case was solely for the purpose of obtaining a certificate which, as they said in the letter quoted above, was necessary before they could appeal. They did not get the certificate immediately but when they did get it on the 10th June, 1969, they thought they were already out of time. Hence this application.

Whether or not they were out of time when the certificate was given is not a question which we are called upon to decide. I shall for the purpose of this application assume that the period to bring an appeal has expired. In *Abdul Majeed v. Yeo Chng Tay*[1] Thomson L.P. dealing with a similar application under the same rule had said:—

"We have considered the matter carefully and we have come to the conclusion that special leave means leave to be granted on account of special circumstances."

In *Ramanath & Ors. v. Ban Tsan Chuan*[2] Pike C.J. dealing with a similar application said:—

"..... The applicant must first show that the facts and circumstances of his case merit the grant by this court of special leave. No doubt, if he satisfied us on this point we would before acceding to his application require to be satisfied that his proposed appeal against the striking out order had merits. But merely to show that such proposed appeal has merits without also showing that there are special grounds for the court to exercise its discretion to grant him special leave to appeal out of time would not, in my opinion, be enough."

The principle so stated must likewise apply to the present application.

In the circumstances of this case it would appear that the applicants were mistaken in the view that without a certificate under rule 22A they were unable to bring an appeal against an interlocutory order. But for such mistake and had they been aware that section 68(2) of the Courts of Judicature Act 1964 provides more ways than one for bringing an appeal, leave to appeal would have been applied for from the High Court or from this court, as the case may be, and if granted the necessity for this application would not have arisen. In *Ramanath & Ors. v. Ban Tsan Chuan*[2] Pike C.J. said:—

"..... But the Act provides a perfectly good alternative procedure for anyone who has let slip the four days within which he can apply for adjournment into court ....."

This means that even if rule 22A applies and the dissatisfied party fails to apply for adjournment into open court for further argument within the prescribed time, there is nothing to prevent him from bringing an appeal by asking for leave under section 68(2) of the Act. The applicants are in a much better position to ask for leave as in their case the question of obtaining a certificate did not arise

at all. Time has run out on them not because of the delay on the part of the trial judge in giving them a certificate but because they have taken the wrong view of the law. In this connection I respectfully agree with the judgment of Thomson J. (as he then was) in *John Puddicombe Wilkins & 2 Others v. John Patrick Kenelm Wilkins & Another*[3] where he said:—

"If it is out of time, then it is out of time for the reason that a mistake has been made as to the law. It is clear from such report as is available of the proceedings of the Court of Appeal in the case of *D.C. Butler-Madden v. Krishnasamy*[4] that the decision in that case was based on the view that the principles relating to the exercise of discretion in this sort of matter as laid down by the English Court of Appeal in the case of *Re Coles and Ravenshear*[5] are applicable to this country. In that case it was held that a mistake in law on the part of the appellant's legal advisers was not sufficient ground for granting special leave to appeal under R.S.C. O. 58 r. 15 as it stood prior to 1909 which corresponds to the Court of Appeal Rules, 1948, r. 11 under which the present application is made.

The decision in *Butler-Madden's* case was followed by the Court of Appeal in the case of *Hendry v. de Cruz*[6] and was followed by Sir Harold Willan, C.J. in the case of *Manickam v. Tremelbye Rubber Company.*[7] I am aware that that last case could with little difficulty be distinguished from the present one but I do not rely on it. I rely on the principles of *Butler-Madden's* case and the case of *Hendry* v. *de Cruz.*

The latest available authority as to the scope of *Ravenshear's* case is to be found in the judgment of the Court of Appeal in the case of *Re Macadam (No. 2)*[8]."

On the facts and on the law the applicants cannot succeed in this application. I would dismiss it with costs.

Azmi L.P. concurred.

*Application dismissed.*

Solicitors: *Skrine & Co.; Ranjit, Thomas & Kula.*

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## CHAN SHI SHI v. ONG TIOW PENG

**[F.C. (Azmi L.P., Suffian and Gill F.JJ.) September 26, 1969]**

**[Kuala Lumpur — Federal Court Civil Appeal No. X. 43 of 1968]**

*Practice and Procedure — Appeal — Filing and serving record of — Appeal filed and served on last day — Differences in court holiday in different States — Whether service within time — Whether cross-appeal within time — Federal Court (Civil Appeals) (Transitional) Rules, 1963, rr. 6(1), 9(1), 13, 18 & 19(1), (4), (6) — R.S.C. 1957 O. 63 r. 3, O. 64 r. 11, O. 71 r. 1.*

The appellant appealed against a judgment of the High Court at Muar and the respondent cross-appealed. The judgment appealed from was delivered on April 29, 1964 but the grounds of judgment were not delivered to the appellant until July 4, 1968. The appellant filed his notice of appeal in the High Court at Muar on May 25, 1968 and a copy of it was served on the respondent. An entry of appeal was thereupon made both in the Registry of the High Court at Muar and the Registry of the Federal Court at Kuala Lumpur. The appellant was required to file a memorandum of appeal within six weeks after the entry of the appeal which meant that the last day for filing the record of appeal was July 6, 1968 which was a Saturday. The record of appeal was filed on July 6, 1968 at the High Court in Muar and a copy of the record was delivered to the respondent's solicitors in Malacca at 12.30 p.m. on the same day. The respondent contended that (a) as Saturday July 6, 1968 was the day preceding the weekly holiday on Sunday in Malacca, the record of appeal should have been served on him before twelve o'clock noon on that day as required by Order 63 rule 3 of the R.S.C. 1957 and therefore the appeal could not be said to have been properly brought before the court and (b) if it was, then the notice of cross-appeal and the filing of the required number of copies in the appropriate Registry was within time although it was not done until July 18, 1968 that is within the 10 day period set out in rule 9(1) of the Federal Court (Civil Appeals) (Transitional) Rules, 1965.

Held: (1) the record of appeal was filed and served well within time. The matter must be decided by reference to the filing hours of the Registry of the High Court at which the documents are required to be filed and the address of service is wholly immaterial so long as service on the respondent was effected within time up to which the filing of the document in the appropriate Registry is permitted;

(2) there would be substance to the respondent's contention only if all the documents in relation to the appeal were required to be filed in the Registry of the High Court at Malacca. As this was not the case that contention cannot stand.

*Case referred to:—*

(1) *Tan Ting Kok* v. *Cheong Lep Keen & Anor.* [1969] 1 M.L.J. 153.

FEDERAL COURT

*W.H. Sault* for the appellant.

*H.B. Ball* for the respondent.

*Cur. Adv. Vult.*

Gill F.J.: This is an appeal against a judgment of the High Court at Muar by the plaintiff in the action in that court, and there is a cross-appeal by the defendant. The defendant as the respondent to the appeal has taken the preliminary point that the memorandum of appeal by the plaintiff was not served on him within the period prescribed by the relevant rules of court, and the plaintiff as the appellant says that the notice of cross-appeal was similarly delivered to him out of time.

The judgment appealed from was delivered on the 29th day of April, 1964, although a copy of the grounds of judgment by the learned trial judge was not delivered to the appellant until the 4th July, 1968. As required by rules 6(1), 13 and 18(1) of the Federal Court (Civil Appeals) (Transitional) Rules, 1963 a notice of appeal by the plaintiff was filed in the Registry of the High Court at Muar on 25th May, 1968, and a copy of it was served on the respondent as required by rule 7 of the same Rules. An